IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION

	NO. 4:06-CR-90-FL-1 NO. 4:12-CV-77-FL	
MARCUS RAY HENDERSON,)	
Petitioner,)	
v.)	ORDER
UNITED STATES OF AMERICA,)	
Respondent.)	

This matter comes before the court on petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (DE # 35). On June 19, 2012, the government filed a motion to dismiss (DE # 38), arguing that the petition was untimely filed and that petitioner in plea agreement waived his right to collaterally attack his conviction. However, on August 20, 2012, the government filed a supplemental memorandum of law and waived its previously asserted defenses. The government suggests that the court reach the merits of the § 2255 petition.

On July 17, 2007, petitioner pled guilty, pursuant to a written plea agreement, to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924. The court sentenced petitioner on January 10, 2008, to a term of 105 months' imprisonment, followed by a three-year term of supervised release. In light of <u>United States v. Simmons</u>, 649 F.3d 237 (4th Cir. 2011) (en banc), petitioner does not have a prior conviction of a crime punishable by imprisonment for a term exceeding one year. A necessary element of the crime of conviction is therefore lacking. <u>See</u> 18 U.S.C. § 922(g)(1). Where the government waives defenses previously asserted in motion to dismiss and concedes that petitioner's motion to vacate sentence should be

granted, and where the court, having reviewed the record, finds petitioner's motion meritorious, said motion is GRANTED, and the judgment of conviction and sentence dated January 10, 2008, is VACATED. Petitioner is ORDERED to be released from federal custody, subject to pending detainers, if any, unless some cause be shown by the government on or before noon on September 14, 2012, why petitioner is not now entitled to this relief.

SO ORDERED, this the 12th day of September, 2012.

LOUISE W. FLANAGAN

United States District Judge

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